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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

BRET E. CAHILL,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR and ROBERT B. REICH,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED

Are injuries to constitutional rights sustained in federally regulated and funded employment offices "fairly traceable" to the conduct of the United States Department of Labor?

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IN THE

Supreme Court of the United States

October Term, 1995

BRET E. CAHILL,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR and ROBERT B. REICH,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petitioner, Bret E. Cahill, respectfully prays that a writ of certiorari be issued to review the *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit issued in the proceeding above July 27, 1995.

OPINIONS BELOW

The opinion of the court of appeals panel of which review is sought was not published. (App. A). The district court order was not published. (App. B, p. 8a). The court of appeals order denying rehearing was not published. (App. C, p. 13a).

STATEMENT OF JURISDICTION

The opinion of the court of appeals panel was entered on July 27, 1995. The suggestion of rehearing en banc was filed September 11, 1995, and denied December 19, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10.1(c).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Constitution

Article I, § 8, cl. 1:

> The Congress shall have Power To lay and collect Taxes . . . and provide for the . . . general Welfare of the United States . . .

Article III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party; . . .

Article IV, § 3, cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .

Amendment I, cl. 2:

> Congress shall make no law . . . abridging the freedom of speech . . .

Amendment V, cl. 4:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statute Law

Act of June 6, 1933, Pub. No. 30-73d Congress, Ch. 49, 48 Statute 113, 114, §§ 3, 4 (The Wagner-Peyser Act)(29 U.S.C. § 49):

> § 3. (a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices . . . The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by prescribing minimum standards of efficiency . . . furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States.
>
> §4. In order to obtain the benefits . . . a State shall, through its legislature, accept the provisions of this Act . . . and cooperate with the United States Employment Service under this Act.

STATEMENT

This suit concerns a First Amendment right to distribute information in public employment offices. These offices are part of the interstate labor recruitment network that has been established pursuant to the Wagner-Peyser Act (Act), 29 U.S.C. § 49 *et seq.* *See Gomez v. Florida State Employment Service*, 417 F.2d 569, 570-71 (5th Cir. 1969). The Act's purpose is to "improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers." 20 C.F.R. § 652.2; *Gomez*, 417 F.2d at 570-72.

The interstate recruitment system is an example of "cooperative federalism." *Gomez*, 417 F.2d at 572. States are

the administrators of the local employment offices, funded partly with federal subsidies. 29 U.S.C. §§ 49d, f, k. As a condition for receiving federal funding, a State must provide the Department of Labor (DOL) with an acceptable plan for implementing the Act and complying with its regulations. 29 U.S.C. §§ 49c, g; 20 C.F.R. § 652.6.

The federal government's responsibilities under the Act are broadly defined. They include: (1) "developing and prescribing minimum standards of efficiency" for public employment services; (2) assisting the States "in meeting problems peculiar to their localities"; (3) promoting administrative and statistical uniformity; (4) "furnishing and publishing information as to opportunities for employment and other information of value"; and (5) "maintaining a system for clearing labor between the States." 29 U.S.C. § 49b. Under DOL's regulations, participating States must establish a labor exchange program with the capacity to assist jobseekers find employment, assist employers in filling jobs, facilitate the match between jobseeker and employee, and "participate in a system for clearing labor between the States." 20 C.F.R. § 652.3.

Cahill wrote to the DOL, requesting that it provide—or require the States to provide—former employees with the same interstate public forum services as that provided employers. The DOL wrote back:

> The Wagner-Peyser Act, as amended, provides Governors with great discretion and latitude in interpreting the Act within their States. This includes establishing priorities to achieve their goals in serving the public. Should a State determine, for example, that a public forum consisting of a reference network of former employees for job seekers to know more about jobs and/or employers is helpful, then the State may elect to disseminate or display such

> information in its local offices. Also, the jobseeker may obtain much information about a job/employer/company by asking questions of the employment service staff, of the employer in the interview, and/or contact numerous community sources.
>
> Should you wish to pursue this matter further, I suggest that you contact the appropriate State official with your proposal.[1]

Cahill then sued the United States Department of Labor alleging that his First Amendment rights are being violated because the public employment offices prohibit him from using their facilities to disseminate information about opportunities for employment (e.g., management styles, pay scales, turnover, working conditions, and advancement opportunities at former employers) to jobseekers while allowing employers to give out this same information. Petitioner argued the DOL has: (1) promoted "viewpoint-based censorship," because only employers are now allowed to disseminate job information through the interstate network; (2) "[a]llowed the governors and civil servants of the states to arbitrarily decide who may communicate with federal funds" and (3) "attempted to confer upon the state departments of labor unbounded discretion and power to censor not granted them under any law." The basis for federal jurisdiction in district court is conferred under 28 U.S.C. §§ 1331, 2201, and 2202.

As remedies for these violations, Cahill requested an injunction requiring the DOL to: (1) "require the federal-state employment offices to provide [him], former employees, job

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[1] Federal respondents and district court occasionally refer to a "network" in their court filings and orders. The record, however, does not reflect that petitioner ever made any claims concerning a "network" in any communication with or any action against federal government.

seekers, and all other U.S. citizens with the same public forum services as that now provided employers," including "administrative support and all forms of communication services" and (2) require employment offices to provide all with "reasonable notification and explanation of these services" including the posting of a flyer. (App. E, p. 19a).

The DOL filed a motion to dismiss or for summary judgment, arguing that Cahill lacked standing, failed to state claims for relief under the First Amendment or Equal Protection Clause, and failed to join an indispensable party (the State of Florida).[2] The DOL also argued that the DOL's refusal to implement a "former employee network" is a discretionary—and, therefore, judicially unreviewable—agency decision.

Relying on *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the district court granted the defendants' motion to dismiss, ruling that the DOL's decision not to implement a reference service for "former employees" was an unreviewable matter of agency discretion under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). "[A] Court cannot review agency action which has been committed to agency discretion by law." (App. B, p. 11a).

The appellate court affirmed on different grounds, noting that "judicial review of constitutional claims is presumed to be available unless Congress has expressed a clear intent to preclude it . . . [and] [n]othing in the Wagner-Peyser Act seems to evidence an intent to preclude judicial review of Cahill's First Amendment claim." (App. A, p. 6a). The panel decided Cahill's injuries were not sufficiently traceable to

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[2] Federal respondents and district court occasionally refer to the "State of Florida" in their court filings and orders. The record, however, does not show that the petitioner ever made any claims concerning the State of Florida.

federal respondents' conduct to satisfy the second branch of standing:

> For purposes of argument, we assume that Cahill has made allegations sufficient to satisfy the first and third requirements for standing--i.e., an actual or threatened First Amendment injury capable of being redressed by judicial action. He falls short, however, of demonstrating that this injury is the proximate result of the DOL's conduct. He does not allege, for example, that the alleged restrictions stem from the DOL's violation of, or enforcement of, statutory or regulatory standards. Nor does he identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available to non-employers. Moreover, when Cahill contacted DOL, it did not affirmatively bar him from spreading information in local employment offices, but simply referred him to state officials.

(App. A, p. 7a).

On December 19, 1995, the United States court of appeals denied Cahill's suggestion of rehearing *en banc.*

REASONS FOR GRANTING THE WRIT

The appellate decision is remarkable in that it appears to contradict itself as well as the opinions of this Court. The panel found, in essence, that the federal government is not responsible for the offices it regulates. For almost six decades, however, this Court has upheld the justiciability of actions against the federal government in cooperative programs. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883 (1937).

This case is of utmost public importance. The national economy will not function properly if Cahill and other working Americans do not communicate with each other about employment information.

I. INJURIES TO CONSTITUTIONAL RIGHTS SUSTAINED IN A FEDERALLY REGULATED AND FUNDED COOPERATIVE PROGRAM ARE "FAIRLY TRACEABLE" TO THE FEDERAL GOVERNMENT'S CONDUCT

Under Article III the judiciary limits its own power to actual "cases" and "controversies" and is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). "[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, ___, 112 S.Ct 2130, 2136 (1992). "In The Federalist No. 48, Madison expressed the view that '[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere,' whereas 'the executive power [is] restrained within a narrower compass and . . . more simple in its nature,' and 'the judiciary [is] described by landmarks still less uncertain.'" *Id.* In *Vander Jagt v. O'Neill*, 226 U.S. App. D.C. 14, 26-27, 699 F.2d 1166, 1178-1179 (1983) the appellate court found:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and

> explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresented judiciary in our kind of government."

"The Article III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324 (1984). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 750-751 citing *Warth*. "The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, see *United States v. SCRAP*, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions." *Vil. of Arlington Hts. v. Metro. Housing Dev.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561 (1977). "'To satisfy the second prong of the constitutional standing requirement,' the Court has held, requires 'no more than a showing that there is a substantial likelihood that the relief requested will redress the injury claimed.'" *McKay v. Horn* 529 F.Supp. 847, 854 (D.C. NJ 1981) citing *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59, 75, n. 20, 98 S.Ct. 2620, 2631, n. 20 (1978).

As an initial consideration, the appellate court correctly assumes Cahill satisfies the first and third elements of standing—an invasion of a legally protected interest capable of being redressed by a favorable decision. (App. A, p. 7a). The offices were reserved specifically for speech identical to that of petitioner's, namely, "furnishing and publishing information as to opportunities for employment and other information of value." 29 U.S.C. § 49b(4). The only difference between the speech of employers and that of the petitioner is purely a matter of viewpoint. This Court has been very clear that viewpoint-based censorship violates both

equal protection implied under the Fifth Amendment and the free speech clause of the First Amendment. Many of a long line of decisions were cited recently in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510, 2516 (1995): "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."

The lower court also cited appropriate authorities providing that the program was federally regulated:

> The interstate recruitment system is an example of "cooperative federalism." See Gomez, 417 F.2d at 572. States control and operate the local employment offices, partly with federal subsidies. 29 U.S.C. § 49d, f, k. As a condition for receiving federal funding, a State must provide the Department of Labor with an acceptable plan for implementing the Act and complying with its regulations. 29 U.S.C. § 49c, g; 20 C.F.R. § 652.6.

(App. A, p. 2a).

Federal regulation or "cooperative federalism" case law, however, never enters into the panel's reasoning on traceability of injuries, the second element of standing.

When federal funds are involved, the federal government has power to impose conditions on the use of federal funds under Art. I, § 8 and Art. IV, § 3 of the Constitution. *See Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 294, 78 S.Ct. 1174, 1185 (1958). "There is of course no question that the Federal Government, *unless barred by some controlling constitutional prohibition*, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that

extent invalid." (added emphasis) *King v. Smith*, 392 U.S. 309, 333, 88 S.Ct. 2128, 2141 n. 34 (1968).

One of the first decisions on "cooperative federalism" was referenced in *Rosado v. Wyman*, 397 U.S. 397, 422-423, 90 S.Ct. 1207, 1223 (1970):

> It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. As Mr. Justice Cardozo stated, speaking for the Court in Helvering v. Davis, 301 U.S. 619, 645, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1937): "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."

The very existence of this Court's decisions in Medicaid cases show the judiciability of actions against the federal government in cooperative programs, even to the extent that States usually need not be joined as necessary parties. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, (1976); *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, (1976); *Califano v. Wescott*, 443 U.S. 76, 99 S.Ct 2655, (1979); *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980). "The Secretary argues that the actions should be dismissed because the states are indispensably necessary parties and have not been joined in the action. The contention is without merit, as a host of cases, most recently *Califano v. Wescott*, *supra*, demonstrates." *McRae v. Califano*, 491 F.Supp.630, 731 (E.D. NY 1980), *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, *rehearing denied* 448 U.S. 917, 101 S.Ct. 39 (1980).

More recently and on point, free speech in a cooperative scheme was considered judiciable in *Rust v. Sullivan*, 500

U.S. 173, 111 S.Ct. 1759 (1991)(disseminating abortion information in a Health and Human Services program).

The appellate court's rational on standing is similar to that attempted by the defense in *McKay v. Horn*, 529 F.Supp. 847 (D.C. NJ 1981). The government did not deny that the plaintiffs satisfied the first, or "injury in fact," element of standing, but focused on the second, or "causal connection," branch. The defendants "marshalled substantial case law support for their contention that the 'voluntary' nature of state participation . . . deprive[d] claimants of standing to challenge Congressionally enacted amendments." *Id.* at 854. District Court restated the government's case: "The federal defendants assert, in effect, that Congress may establish unconstitutional conditions for a state's continued participation in a cooperative program, then insulate its action from judicial review by invoking the cloak of standing against the ultimate beneficiaries of the program." *Id.* at 857.

In another unemployment insurance action, *Rivera v. Patino*, 524 F.Supp. 136 (N.D. CA 1981), the district court held:

> "The case law makes it quite clear that an intended beneficiary of a cooperative federal-state assistance program, such as unemployment insurance or Medicaid has the right to seek judicial review of federally-imposed eligibility requirements. . . . Defendants' suggestion is so far from the actual rule that, in one case where the plaintiff asserted a federal statutory challenge to the state's administration of its unemployment insurance program, and failed to join the Secretary of Labor as a defendant, the Supreme Court suggested that he do so in order that complete relief might be accorded. *California Dept. of Human Resources v. Java*, 402 U.S. 121 at 135, n.19, 91

S.Ct. 1347 at 1355, n.19, 28 L.Ed.2d 666 (1971).

(some citations omitted) *Rivera* at 142.

In *Bermudez v. United States Department of Agriculture*, 490 F.2d 718, *cert. denied, Butz v. Bermudez*, 414 U.S. 1104, 94 S.Ct. 737 (1973) welfare recipients were, through state administrative error, wrongfully denied participation in the food stamp program for various periods of time. Declaratory judgment and injunctive relief was sought against federal defendants. The federal government contended that the States involved, New York and Connecticut, were indispensable parties under Rule 19 of the Federal Rules of Civil Procedure and since they were not joined as defendants that the action should be dismissed. The appellate court found:

> The district court held that the States failed to meet the standards for indispensability imposed by the Supreme Court in Provident Tradesman Bank & Trust Company v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), and that joinder of the States was not warranted. In the *Provident* case the Supreme Court raised the following question in determining whether joinder was necessary: "Can the decree be written so as to protect the legitimate interests of the outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery?" [n. 21: "390 U.S. at 112, 88 S.Ct. at 739"]
>
> In this action the plaintiffs seek to adjudicate their rights vis-a-vis the federal government and request recission of federal policy. The order of the district court met the requirements set forth in *Provident*. The order was sufficient to meet the plaintiffs' needs. The interests of the States were protected as no liability was imposed on them.

> Only the federal defendants were held responsible for retroactive benefits. The district court noted correctly that the defendants' argument as to the indispensability of the States assumed the strength of its case on the merits. We find that the federal defendants and not the States are liable, and hence there is no such strength. Finally, the plaintiffs seek to prosecute this action as a class action with a nationwide class. To hold each State an indispensable party would require that each State participating in the food stamp program be joined as a party. In view of our decision on the merits, this is as unnecessary as it would be unwieldy.

Id. at 726.

While the appellate court cites three decisions on standing, none involve cooperative programs. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct 2130 (1992); *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 804 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Harris v. Evans*, 20 F.3d 1118 (11th Cir.), *cert. denied*, 115 S.Ct. 641 (1994). (App. A, p. 6a).

The first two are "generalized grievance" cases where constitutional rights are never invoked, and *Harris* is a third party claim for free speech, the right of prison guards to write letters to parole officers. All parties agree Cahill is asserting *Cahill's* right to communicate with others.

The panel's reasoning includes only three additional statements: "He does not allege, for example, that the alleged restrictions stem from the DOL's violation of, or enforcement of, statutory or regulatory standards." (App. A, p. 7a).

It is very well settled that judiciability may be maintained on violations of constitutional rights as well as violations of statute law or regulations. According to the Administrative

Procedure Act (APA), "the reviewing court shall . . . interpret constitutional and statutory provisions . . ." 5 U.S.C. § 706. The appellate court has already assumed a First Amendment injury.

The panel continues: "Nor does he identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available to non-employers." *Id.*

The record does not reflect that the issue was ever whether or not the federal government may actively prohibit or discourage States from making their federally-subsidized services available to non-employers. The issue is whether the federal government may, through inaction, allow the States to promote or engage in unconstitutional viewpoint-based censorship with federal funds. (App. B, p. 6a). "The APA defines 'agency action' to include 'failure to act.' 5 U.S.C. § 551(13)." *N.A.A.C.P. v. Secretary of Housing & Urban Dev.*, 817 F.2d. 149, 160 (1st Cir. 1987). "The reviewing court shall hold unlawful and set aside agency action [or inaction] . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

Finally the court writes: "Moreover, when Cahill contacted DOL, it did not affirmatively bar him from spreading information in local employment offices, but simply referred him to state officials." *Id.*

This is merely a restatement of facts, not a reason for absolving federal responsibility.

Unlike the federal defendants in *Bermudez* or *McKay, supra,* neither the federal respondents nor the lower courts have even attempted to mask federal liability. Obviously, if the federal government regulates the employment offices, then constitutional injuries sustained in those offices are "fairly traceable" to the federal government's conduct.

II. FREE SPEECH ON EMPLOYMENT ISSUES IS OF IMPERATIVE IMPORTANCE TO THE NATIONAL ECONOMY

Freedom to communicate economic information is indispensable to any functional economy. Each and every free market trade is always preceded by freedom of communication on economic issues. The employer-employee relationship under "employment at will" unquestionably represents a market exchange where information as to opportunities for employment is the relevant economic information. Freedom for all to disseminate employment information is, therefore, a precondition of "at will" employment.

These critically important, self-evident truths have managed to fly under the radar of most economists[3] and have never been reflected in any First Amendment litigation on the scale of the instant action. For Cahill and the great mass of working Americans, the most important trade is, by far, that of their time, imagination, knowledge, skills and labor for employment income.

Secretary Reich implies the importance of economic information in *Work of Nations* (1991) where he classifies jobs by their "competitive advantage." The more highly valued "symbolic analytic" jobs, always involve

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[3] Ayn Rand comes closest to treating this topic. In response to a Professor Ronald Coase who suggested government regulation of the press be on an equal plane with government regulation of markets, Rand writes, "Mr. Coase seems to regard this as a historical accident or a matter of tradition. He does not see or mention the fact that the demand for freedom of ideas had to precede freedom of trade, that without the heroic struggle of those who fought for a free market in ideas, no such thing as a free market in goods would or could have been discovered." (original emphasis) *The Ayn Rand Letter*, Vol. III, No. 15, Ideas v. Men, p. 2, April 22, 1974.

communication on matters of economic consequence while "routine producers" and "in-person servers" have little or no input. *Id.* p. 174-179, 219. (App. D, p. 15a-18a). Empirical studies are not required here. Those who do not communicate on economic issues can not compete.

Everyone, however, may not always be able to support himself as a consultant. In order to compete, employees must have free speech on an equal footing as employers. "Labor and capital, employer and employee, stand upon the same basis before this court, with respect to constitutional rights." *The Oakmar*, 20 F.Supp. 650, 651 (D.C. MD 1937).

The respondents' irrational abhorrence of the speech of working Americans contributes to many of the very problems the Secretary of Labor seeks to solve. Viewpoint-based censorship of employment information is, and can only be, the cause of low wage, low skill jobs and the increasing disparity of wealth in this nation. These, in turn, exacerbate a multitude of other economic, social, political and legal ills, from federal deficits to poor race relations to foreign trade protectionism to increased civil litigation against employers. It is of imperative public importance that everyone have free speech on employment matters.

The perpetuation of unjust, dysfunctional situations simply out of a fear of Americans talking to each other has never been the source of this country's greatness. The original spirit of this nation was best expressed by Justice Brandeis. "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty." *Whitney v. People of State of California*, 274 U.S. 357, 375, 47 S.Ct. 639, 648 (1926).

CONCLUSION

Bret Cahill has demonstrated that the injuries to his constitutional rights in the public employment offices are "fairly traceable" to the conduct of the federal government. He meets all the elements of standing. Certiorari should be granted.

Respectfully submitted,

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APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 27, 1995

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3286
Non-Argument Calendar

D. C. Docket No. 93-1437-CIV-T-21A

BRET E. CAHILL,

Plaintiff-Appellant,

versus

DEPARTMENT OF LABOR; ROBERT B. REICH,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(July 27, 1995)

Before EDMONDSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

Bret Cahill, a Florida citizen, appeals the district court's determination that the defendant's allegedly unconstitutional

actions were not subject to judicial review. We affirm on the ground that Cahill lacked standing to sue.

BACKGROUND

This suit concerns a claimed First Amendment right to distribute information in public employment offices. These offices are part of the interstate labor recruitment network that has been established pursuant to the Wagner-Peyser Act (Act), 29 U.S.C. 49 et seq. See Gomez v. Florida State Employment Service, 417 F.2d 569, 570-71 (5th Cir. 1969). The Act's purpose is to "improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers." 20 C.F.R. § 652.2; see Gomez, 417 F.2d at 570-72. The Act "was also intended to offer some protection to those employees who shift about the country to meet the needs of those employers who voluntarily use the resources of the federal government to secure workers." Gomez, 417 F.2d at 571-72.

The interstate recruitment system is an example of "cooperative federalism." See Gomez, 417 F.2d at 572. States control and operate the local employment offices, partly with federal subsidies. 29 U.S.C. § 49d, f, k. As a condition for receiving federal funding, a State must provide the Department of Labor with an acceptable plan for implementing the Act and complying with its regulations. 29 U.S.C. § 49c, g; 20 C.F.R. § 652.6.

The federal government's responsibilities under the Act are broadly defined. They include: (1) "developing and prescribing minimum standards of efficiency" for public employment services; (2) assisting the States "in meeting problems peculiar to their localities"; (3) promoting administrative and statistical uniformity; (4) "furnishing and publishing information as to opportunities for employment and other information of value"; and (5) "maintaining a

system for clearing labor between the States." 29 U.S.C. § 49b. Under DOL's regulations, participating States must establish a labor exchange program with the capacity to assist jobseekers find employment, assist employers in filling jobs, facilitate the match between jobseeker and employee, and "participate in a system for clearing labor between the States." 20 C.F.R. § 652.3.

Cahill filed this suit against the United States Department of Labor. Cahill, who is neither an employer nor a jobseeker, alleged that his First Amendment rights are being violated because state-run employment offices prohibit him from using their facilities to disseminate information about employers (e.g., facts about pay scales, turnover, working conditions, and advancement opportunities) to jobseekers. Cahill further alleged that he wrote to the DOL, demanding that it allow--or require the States to allow--"former employees" to use the interstate network to disseminate such information. The DOL wrote back:

> The Wagner-Peyser Act, as amended, provides Governors with great discretion and latitude in interpreting the Act within their States. This includes establishing priorities to achieve their goals in serving the public. Should a State determine, for example, that a public forum consisting of a reference network of former employees for job seekers to know more about jobs and/or employers is helpful, then the State may elect to disseminate or display such information in its local offices. Also, the jobseeker may obtain much information about a job/employer/company by asking questions of the employment service staff, of the employer in the interview, and/or contact numerous community sources.

> Should you wish to pursue this matter further, I suggest that you contact the appropriate State official with your proposal.

(R1-9 Exh. 2 (emphasis added); R1-1 at 2-3).

Cahill contended that by refusing to honor his request, the DOL has: (1) promoted "viewpoint-based censorship," because only employers are now allowed to disseminate job information through the interstate network; (2) "[a]llowed the governors and civil servants of the states to arbitrarily decide who may communicate with federal funds;" and (3) "attempted to confer upon the state departments of labor unbounded discretion and power to censor not granted them under any law."

As remedies for these alleged violations, Cahill requested an injunction requiring the DOL to: (1) "require the federal-state employment offices to provide [him], former employees, job seekers, and all other U.S. citizens with the same public forum services as that now provided employers," including "administrative support and all forms of communication services;" and (2) require employment offices to provide "reasonable notification and explanation of these services" to all.

The DOL filed a motion to dismiss or for summary judgment, arguing that Cahill lacked standing, failed to state claims for relief under the First Amendment or Equal Protection Clause, and failed to join an indispensable party (the State of Florida). The DOL also argued that the DOL's refusal to implement a "former employee network" is a discretionary--and, therefore, judicially unreviewable--agency decision.

Relying on Heckler v. Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the district court granted the defendants' motion to dismiss, ruling that the DOL's decision

not to implement a reference service for "former employees" was an unreviewable matter of agency discretion.

DISCUSSION

Cahill contends that dismissal was improper because he has alleged a colorable First Amendment claim. He reasserts that federally-subsidized employment offices engage in arbitrary "viewpoint censorship" by allowing only employers to use their "communication services." Relying on decisions striking down regulations that grant censorship discretion to government officials, Cahill argues that the DOL has violated the First Amendment by failing to issue regulations requiring the States to provide these services to non-employers.

The DOL responds that dismissal was proper because (1) Cahill failed to demonstrate that the DOL has restricted his communication at public employment offices, and (2) even if his First Amendment rights have been curtailed, the restrictions are reasonable because employment offices are nonpublic forums, whose facilities may be reserved for their intended purpose.

As a preliminary matter, the DOL does not defend the district court's rationale for dismissing the lawsuit. Indeed, the district court's reliance on Heckler v. Chaney seems somewhat misplaced. In Chaney, the Supreme Court held that an agency's decision not to take enforcement action is "presumptively unreviewable" under the Administrative Procedure Act. Chaney, 470 U.S. at 831-35, 105 S.Ct. at 1655-57. This presumption "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Id. at 832-33, 105 S.Ct at 1656.

Cahill's lawsuit. however, might not concern the exercise (or non-exercise) of statutory enforcement power. Even assuming, arguendo, that the DOL's "inaction" on Cahill's

letter is akin to a refusal to take enforcement action, Chaney does not mandate dismissal because the Supreme Court clearly indicated that its holding did not address the reviewability of enforcement decisions that violate constitutional rights. Chaney 470 U.S. at 838, 105 S.Ct. 1649; Id. at 839, 105 S.Ct. at 1659 (Brennan, J., concurring). In addition, judicial review of constitutional claims is presumed to be available unless Congress has expressed a clear intent to preclude it. See Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 832 (1988). Nothing in the Wagner-Peyser Act seems to evidence an intent to preclude judicial review of Cahill's First Amendment claim.

But, we pass over the Chaney question because the dismissal of Cahill's suit can be affirmed on other grounds. Cf. Powers v United States, 996 F.2d 1121, 1123-24 (11th Cir. 1993)(Court "may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below"). Though not characterized as such, the DOL's argument that it "did not prohibit or restrict Cahill in any way" is, in essence, a claim that he lacks standing to sue.

The concept of standing is a central component of Article III's jurisdictional requirement that a "case or controversy" exist between the litigants. Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir.), cert. denied, 115 S.Ct. 641 (1994). Three constitutional requirements are needed for standing: (1) the plaintiff must have suffered, or is likely to suffer, an injury to a legally protected interest; (2) the injury must be "fairly traceable" to defendants' conduct; and (3) the injury is likely to be redressed by a favorable ruling. Lujan v. Defenders of Wildlife, 504 U.S. 555 __, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d at 800, 804 (11th Cir. 1993)(citing and quoting Lujan), cert. denied, 114 S.Ct. 683 (1994).

The existence of standing is an issue that we review de novo. Alcock, 993 F.2d at 806. In addition, standing is a jurisdictional prerequisite that may be raised sua sponte by us. Id. at 807 n.7. Because dismissal occurred at the pleading stage, we must accept as true the allegations of the complaint and construe it in Cahill's favor. Harris v. Evans, 20 F.3d at 1121 n.4. In addition, we may consider undisputed facts that appear outside the complaint. Cone Corp. v. Florida Department of Transportation, 921 F.2d 1190, 1206 n.50 (11th Cir.), cert. denied, 500 U.S. 942 (1991).

For purposes of argument, we assume that Cahill has made allegations sufficient to satisfy the first and third requirements for standing--i.e., an actual or threatened First Amendment injury capable of being redressed by judicial action. He falls short, however, of demonstrating that this injury is the proximate result of the DOL's conduct. He does not allege, for example, that the alleged restrictions stem from the DOL's violation of, or enforcement of, statutory or regulatory standards. Nor does he identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available to non-employers. Moreover, when Cahill contacted DOL, it did not affirmatively bar him from spreading information in local employment offices, but simply referred him to state officials.

In short, the record does not establish that the alleged abridgement of Cahill's First Amendment rights is "fairly traceable" to the conduct of the DOL. Accordingly, we affirm the order dismissing his lawsuit. Alcock, 993 F.2d at 806 ("when standing is questioned for the first time by an appellate court, standing 'must affirmatively appear in the record'").

AFFIRMED.

APPENDIX B—ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION FILED SEPTEMBER 26, 1994.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRET E. CAHILL,

Plaintiff,

v. Case No. 93-1437-CIV-T-21(A)

UNITED STATES DEPARTMENT OF LABOR, et al.,

Defendants.

ORDER

Before the Court is the defendants' motion to dismiss [or motion for summary judgment against] the plaintiff's pro se complaint (D-9). The plaintiff's response appears at (D-26).

In his complaint (D-1) the plaintiff seeks declaratory and injunctive relief requiring that the Department of Labor ("DOL") provide or mandate that the federally-subsidized state employment offices afford "former employees" the same services that the employment offices now provide employers. In the alternative, the plaintiff asks this Court to require the state employment offices "to establish and maintain a network of former employees willing to be references for job seekers on employers."

The government advances the following two arguments in support of dismissal of this action: (1) the plaintiff lacks standing and therefore this Court lacks subject matter jurisdiction over this action pursuant to Fed. R. Civ. P. 12(b)(1); (2) the plaintiff's complaint fails to state a claim upon which relief can be granted and therefore the Court must dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6).

Congress enacted the Wagner-Peyser Act[1] ("Act") to establish within the DOL the United States Employment Service ("USES"), "to promote the establishment and maintenance of a national system of public employment offices." 29 U.S.C. § 49 (1988). "The basic purpose of the employment service system is to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employees who are seeking workers." 20 C.F.R. § 652.2. As a condition for participating and receiving funds, each state must enact legislation which accepts terms of the Act and creates a state agency to cooperate with USES. 29 U.S.C. § 49(c).

The state agency must administer a labor exchange system which has the capacity to:

(a) assist job seekers in finding employment;

(b) assist employers in filling jobs;

(c) facilitate the match between job seekers and employers;

(d) participate in a system for clearing labor between the states, including the use of standardized classification systems issued by the Secretary of

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[1] The Court has retrieved this text from the government's memorandum in support of its motion to dismiss (D-9 @ pgs. 4-6), finding it as an accurate recitation of the history of the Act.

Labor pursuant to the Job Training Partnership Act (JTPA) section 462(c)(3); and

(e) meet the work test requirements of the State unemployment compensation system.

20 C.F.R. § 652.3.

The Act requires that ninety percent of the funds allotted to a state must be used for:

(1) job search and placement services to job seekers which may include counseling, testing, occupational and labor market information, assessment, and referral to employers;

(2) appropriate recruitment services and special technical services for employers;

(3) for any of the following activities:

(A) evaluation of programs;

(B) developing linkages between services funded under this chapter and related Federal or State legislation, including the provisions of labor exchange services at education sites;

(C) providing services for workers who have received notice of permanent layoff or impending layoff, or workers in occupations which are experiencing limited demand due to technological change, impact of imports, or plant closures;

(D) developing and providing labor market and occupational information;

(E) developing a management information system and compiling and analyzing reports therefrom; and

> (F) administering the work test for the State unemployment compensation system and providing job finding and placement services for unemployment insurance claimants.

29 U.S.C. § 49f(a); see 20 C.F.R. § 652(a) and (b).

Each state employment agency carries out these activities by preparing an annual plan with the state's JTPA private industry councils and chief elected officials of JTPA service delivery areas. 29 U.S.C. § 49(g); see 20 C.F.R. § 652.6. The state submits the plan to the Secretary of Labor for approval, after approval by the state's JTPA job training coordinating council and Governor's review. Id.

State employment service agencies may agree to perform other services or activities, as specified in contracts or agreements with federal, state, or local public agencies, JTPA administrative entities, or private nonprofit organizations. 29 U.S.C. § 49f(c).

Under the Act, DOL is responsible for "developing and prescribing minimum standards of efficiency" in public employment offices. 29 U.S.C. § 49b(a). It must also assist the states in the coordination of "[s]tate public employment offices . . . [by] maintaining a system for clearing labor between the states." Id.

The Supreme Court, in Heckler v. Chaney 470 U.S. 821, (1985) held that under § 701(a)(2) of the Administrative Procedure Act, a Court cannot review agency action which has been committed to agency discretion by law. The Heckler Court held, inter alia:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed"

> the decision making to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706 -- if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for "abuse of discretion."

Id. at 830.

Congress gave the Secretary and the states[2] broad discretion to implement the statute. There is no meaningful guidelines or standards in the Act under which this Court could review the Secretary's [or State's] purported action [or inaction]. DOL, through its Congressionally delegated discretionary powers, has chosen not to implement a former employee's network. The Heckler Court, in interpreting theAdministrative Procedure Act, prudently decided to limit the Courts' review of this discretionary power. The Heckler Court obviously envisioned the impossibilities of doing otherwise.

It is therefore ORDERED:

(1) That the defendants' motion to dismiss (D-9) is GRANTED and this case is DISMISSED.

DONE AND ORDERED at Tampa, Florida this 26th day of September, 1994.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

[2] The plaintiff has not named as a party-defendant the State of Florida.

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 19, 1995

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3286

BRET E. CAHILL,

Plaintiff-Appellant,

versus

DEPARTMENT OF LABOR;
ROBERT B. REICH,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19____, _____F.2d_____).

Before: EDMUNDSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

Appendix D—Excerpts from *Work of Nations* (1991)

From the chapter "The Three Jobs of the Future" pages 174-178:

Essentially, three broad categories of work are emerging, corresponding to the three different competitive positions in which Americans find themselves. The same three categories are taking shape in other nations. Call them *routine production services, in-person services,* and *symbolic-analytic services.*

Routine production services entail the kinds of repetitive tasks performed by the old foot soldiers of American capitalism in the high-volume enterprise. They are done over and over—one step in a sequence of steps for producing finished products tradeable in world commerce. Although often thought of as traditional blue-collar jobs, they also include routine supervisory jobs performed by low- and mid-level managers—foremen, line managers, clerical supervisors, and section chiefs—involving repetitive checks on subordinates' work and the enforcement of standard operating procedures.

Routine production services are found in many places within a modern economy apart from the older, heavy industries (which, like elderly citizens, have been given the more delicate, and less terminal. appellation: "mature"). They are found even amid the glitter and glitz of high technology. Few tasks are more tedious and repetitive, for example, than stuffing computer circuit boards or devising routine coding for computer software programs.

Routine producers usually must be able to read and to perform simple computations. But their cardinal virtues are reliability, loyalty, and the capacity to take direction. Thus does a standard American education, based on the traditional premises of American education, normally suffice.

In-person services, the second kind of work that Americans do, also entail simple and repetitive tasks. And like routine production services, the pay of in-person servers is a function of hours worked or amount of work performed; they are closely supervised (as are their supervisors), and they need not have acquired much education (at most, a high school diploma, or its equivalent, and some vocational training).

The big difference between in-person servers and routine producers is that *these* services must be provided person-to person, and thus are not sold worldwide. . . . Included in this category are retail sales workers, waiters and waitresses, hotel workers, janitors, cashiers, hospital attendants and orderlies, nursing home aides, child care workers, house cleaners, home health care aides, taxi drivers, secretaries, flight attendants, physical therapists, and—among the fastest-growing of all—security guards.

In person servers are supposed to be as punctual, reliable, and tractable as routine production workers. But many in-person servers share one additional requirement: They must have a pleasant demeanor. . .

Symbolic-analytic services, the third job category, include all the problem-solving, problem identifying, and strategic-brokering activities we have examined in previous chapters. Like routine production services (but *unlike* in-person services), symbolic-analytic services can be traded worldwide and thus must compete with foreign providers even in the American market. But they do not enter world commerce as standardized things. Traded instead are the manipulations of symbols—data, words, oral and visual representations.

Symbolic analysts solve, identify, and broker problems by manipulating symbols. They simplify reality into abstract images that can be rearranged, juggled, experimented with, communicated to other specialists, and then, eventually

transformed back into reality. The manipulations are done with analytic tools, sharpened by experience. The tools may be mathematical algorithms, legal arguments, financial gimmicks, scientific principles, psychological insights about how to persuade or amuse, systems of induction or deduction, or any other set of techniques for doing conceptual puzzles.

Some of these manipulations reveal how to more efficiently deploy resources or shift financial assets, or otherwise save time and energy. Other manipulations yield new inventions--technological marvels, innovative legal arguments, new advertising ploys for convincing people that certain amusements have become life necessities. Still other manipulations—of sounds, words, pictures—serve to entertain their recipients, or cause them to reflect more deeply on their lives or on the human condition. Others grab money from people too slow or naive to protect themselves by manipulating in response.

Like routine producers, symbolic analysts rarely come into direct contact with the ultimate beneficiaries of their work. But other aspects of their work life are quite different from that experienced by routine producers. Symbolic analysts often have partners or associates rather than bosses or supervisors. Their incomes may vary from time to time, but are not directly related to how much time they put in or the quantity of work they put out. Income depends, rather, on the quality, originality, cleverness, and, occasionally, speed with which they solve, identify, or broker new problems. Their careers are not linear or hierarchical; they rarely proceed along well-defined paths to progressively higher levels of responsibility and income. In fact, symbolic analysts may take on vast responsibilities and command inordinate wealth at rather young ages. Correspondingly, they may lose authority and income if they are no longer able to innovate by building on their cumulative experience, even if they are quite senior.

From subchapter "5" of "Why the Rich Are Getting Richer and the Poor, Poorer" page 219.

UNLIKE the boats of routine producers and in-person servers, however, the vessel containing America's symbolic analysts is rising. Worldwide demand for their insights is growing as the ease and speed of communicating them steadily increases. Not every symbolic analyst is rising as quickly or as dramatically as every other, of course; symbolic analysts at the low end are barely holding their own in the world economy. But symbolic analysts at the top are in such great demand worldwide that they have difficulty keeping track of all their earnings. Never before in history has opulence on such a scale been gained by people who have earned it, and done so legally.

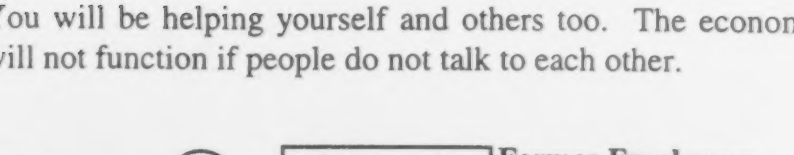
Appendix E—The Flyer

***** NOTICE *****

All Americans--former employees and job seekers as well as employers--have the right to disseminate information as to opportunities for employment using the facilities of these offices. A former employee, for example, may use the bulletin boards, computer listings and other services to inform the public of a former employer's

Hiring Policies
Pay Scales
Advancement Opportunities
Working Conditions
Management Styles
Turnover Rates
& Much More

You will be helping yourself and others too. The economy will not function if people do not talk to each other.



"Let every sluice of knowledge be opened and set a-flowing."
--John Adams (1765)

Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

(2)

No. 95-1444

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRET E. CAHILL, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether petitioner lacked standing to sue the Secretary of Labor for allegedly violating his First Amendment rights by failing to require States operating federally subsidized employment offices to give former employees, including petitioner, access to the offices' communication services.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1444

BRET E. CAHILL, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not reported, but the judgment is noted at 63 F.3d 1111 (Table). The opinion of the district court (Pet. App. 8a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1995. A petition for rehearing was denied on December 19, 1995. Pet. App. 13a-14a. The petition for a writ of certiorari was filed on March 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Wagner-Peyser Act in 1933 to establish the United States Employment Service (USES) "to promote the establishment and maintenance of a national system of public employment offices." 29 U.S.C. 49. The Act, as amended by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.*, directs the Secretary of Labor, through the USES, to assist state public employment services nationwide by, *inter alia*, "furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States." 29 U.S.C. 49b(a).

To obtain funding under the Act, a State must, by legislation, accept the Act's provisions and designate or create a state agency with the powers necessary to cooperate with the Department of Labor (DOL). 29 U.S.C. 49c. The state agency must submit to the Secretary a detailed plan for carrying out the provisions of the Act. 29 U.S.C. 49g(a); see generally 29 U.S.C. 49g, 1512, 1532. The Act requires the Secretary to approve state plans that "are in conformity with [the Act] and reasonably appropriate and adequate to carry out its purposes." 29 U.S.C. 49g(e). The Secretary is authorized "to establish performance standards for activities under [the Act]," but, in doing so, must "take into account the differences in priorities reflected in State plans." 29 U.S.C. 49*l*(a). The only prescribed content of a state plan under the Act is that it provide opportunities and services for the handicapped. 29 U.S.C. 49g(d).

b. The Secretary is authorized to promulgate "such rules and regulations as may be necessary to

carry out the provisions of" the Act. 29 U.S.C. 49k. The Secretary's regulations state that "[t]he basic purpose of the employment service system is to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers." 20 C.F.R. 652.2. The regulations require that, "[a]t a minimum, each State shall administer a labor exchange system which has the capacity: (a) To assist jobseekers in finding employment; (b) To assist employers in filling jobs; (c) To facilitate the match between jobseekers and employers; (d) To participate in a system for clearing labor between the States," and "(e) To meet the work test requirements of the State unemployment compensation system." 20 C.F.R. 652.3; see 20 C.F.R. 652.6(a)(4)(iii).[1] The manner in which those goals are met is to be set forth in annual state plans. 20 C.F.R. 652.6(a)(4)(iii). The Secretary is authorized to "impose appropriate sanctions and corrective actions for violation of the Act, regulations, or State plan," which may include reduction of funding to the State's program. 20 C.F.R. 652.8(g)(1).

2. Petitioner, who is neither a jobseeker nor an employer, wrote to the Department of Labor "demanding that it allow—or require the States to allow—'former employees' to use the interstate network" of state-run employment offices to disseminate "information about employers (*e.g.* facts about pay scales, turnover, working conditions, and advancement oppor-

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[1] The regulations prohibit discrimination in the provision of services under the Act based on, among other things, "political affiliation or belief," 20 C.F.R. 652.8(j), and bar referrals to jobs that are vacant due to labor disputes, 20 C.F.R. 652.9.

tunities) to jobseekers." Pet. App. 3a; see Pet. 4. The Department of Labor responded by letter that the Act vests discretion in the States to establish program priorities and goals. *Ibid.* The Department pointed out that States are free under the Act to establish "a public forum consisting of a reference network of former employees for job seekers to know more about jobs." *Ibid.* The Department's letter suggested that petitioner "contact the appropriate State official with [his] proposal." Pet. App. 3a-4a; Pet. 5.

3. Petitioner, acting pro se, sued the Department and Secretary of Labor, alleging that "his First Amendment rights are being violated because state-run employment offices prohibit him from using their facilities to disseminate information about employers." Pet. App. 3a. In his view, the Department "violated the First Amendment by failing to issue regulations requiring the States to provide these services to non-employers." *Id.* at 5a. He sought an injunction ordering the Department to require the state employment offices to provide him with the same services as they provide to employers, and to require employment offices to post notice of those services. *Id.* at 4a, 19a (proposed notice).

The district court, relying on *Heckler* v. *Chaney*, 470 U.S. 821 (1985), dismissed petitioner's complaint on the ground that the Department's decision "not to implement a former employee's network" was an unreviewable matter committed to agency discretion under Section 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. 701(a)(2). Pet. App. 11a-12a.

4. The court of appeals, in a per curiam order, affirmed the dismissal on different grounds. Pet. App. 1a-8a. The court held that petitioner lacked standing under Article III to bring this action. Assuming that

petitioner alleged "an actual or threatened First Amendment injury capable of being redressed by judicial action," the court held that he failed to "demonstrat[e] that this injury is the proximate result of the DOL's conduct." *Id.* at 7a. The court noted that the Department took no regulatory or enforcement action that restricted petitioner's rights or that discouraged the States from satisfying his request, and it concluded that petitioner thus failed to allege that any "abridgement of [his] First Amendment rights is 'fairly traceable' to" action taken by the Department. *Ibid.*

ARGUMENT

The unreported decision of the court of appeals affirming the dismissal of petitioner's complaint is correct. The decision does not conflict with any decision of this Court or with the decision of any other court of appeals. Further review is not warranted.

The court of appeals affirmed the dismissal of petitioner's complaint because he failed to "demonstrat[e] that [his] injury is the proximate result of the [Department's] conduct." Pet. App. 7a. Petitioner complains that he was not allowed to use the communication services of the state public employment offices on the same basis as employers. As the court of appeals correctly observed, he failed to allege that the restrictions "stem from the DOL's violation of, or enforcement of, statutory or regulatory standards," or to "identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available

to non-employers." *Ibid.* Because the complaint established no First Amendment violation that was "fairly traceable" to the Department, the court correctly concluded that petitioner lacked Article III standing. *Ibid.* Petitioner alleged no injury that "reasonably can be said to have resulted, in any concretely demonstrable way," from the Department's conduct. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975).[2] Whether that defect is characterized as a lack of standing or as failure to state a cognizable claim against the Department, the judgment of the court of appeals was correct.[3]

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[2] This case illustrates the instance where the "'fairly traceable' and 'redressability'" components of Article III standing are distinct concepts and not merely "two facets of a single causation requirement." *Allen* v. *Wright*, 468 U.S. 737, 753 n.19 (1984). An order enjoining the Department to require States to afford petitioner the access he seeks might redress petitioner's complaint, but it does not follow that the Department of Labor abridged petitioner's rights.

[3] Petitioner's First Amendment claim is without merit in any event. The claim depends on petitioner's mischaracterization of the communication channels of state public employment offices as public fora. See Complaint at 2 (¶¶ 4, 5) (alleging that public employment offices establish "government fora by custom" and "by designation"). They are, however, neither traditional nor limited public fora, but nonpublic fora. This Court has recognized many comparable facilities as nonpublic fora. See, *e.g.*, *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 683 (1992) (metropolitan airport terminal); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1995) (Combined Federal Campaign); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983) (interschool mail system and teacher mailboxes); *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132-133 (1981) (government-approved

Petitioner cannot trace his injury to the Department, or establish a claim against it, by invoking the fact that the overall system of public employment services was developed through "cooperative federalism." Pet. 10. The cases petitioner cites (Pet. 10-13) for the proposition that the United States' participation in a scheme of cooperative federalism subjects it to suit involved challenges to federally imposed requirements. See *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Bermudez* v. *United States Dep't of Agriculture*, 490 F.2d 718, 720 n.2

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residential letterboxes); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city transit cars).

The only basis for petitioner's contention (Pet. 9-10) that he was excluded from the communication services because of viewpoint discrimination is the fact that employers are permitted to use the communication services of public employment offices and petitioner, who is not a member of that group, is not permitted to do so. The government may, however, place on nonpublic fora restrictions "reasonable in light of the purpose served by the for[a]," including restrictions against participation by any person "not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.").

To the extent that petitioner claims (Pet. 15) that the Department of Labor's unexercised capacity to require States to *create* public fora subjects the Department to First Amendment liability, there is no basis for that claim. Congress has broad discretion to refrain, or to allow federal agencies to refrain, from imposing particular requirements as a condition of state participation in a federally funded program.

(D.C. Cir.), cert. denied, 414 U.S. 1104 (1973); *McKay* v. *Horn*, 529 F. Supp. 847, 856-857 (D.N.J. 1981); *Rivera* v. *Patino*, 524 F. Supp. 136, 142 (N.D. Cal. 1981).[4] No such federal requirement or action caused the harm of which petitioner complains.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996

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[4] Other cases petitioner cites (Pet. 11) did not involve claims against the United States. See *Singleton* v. *Wulff*, 428 U.S. 106 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968).

(3)

Supreme Court, U.S.
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No. 95-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRET E. CAHILL,

PETITIONER,

v.

UNITED STATES DEPARTMENT OF LABOR AND ROBERT B. REICH,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY

The government's brief in opposition independently illustrates why the petition for writ of certiorari should be granted. The respondents never answer the question they themselves present. Also, the government raises the issue of free speech in government fora after the appellate court "assumed" Cahill satisfied the "injury in fact" prong of standing, a violation of first amendment rights.

I. RESPONDENTS NEVER DISAGREE WITH PETITIONER ON GOVERNMENTAL INACTION

The respondents present the proper issue in their question, "[w]hether petitioner lacked standing to sue the Secretary of Labor for allegedly violating his First Amendment Rights by failing to require States operating federally subsidized employment offices to give former employees, including petitioner, access to the offices' communication services." (Resp. Brief, p. I). Only two statements in the text,[1] however, can possibly be construed as an answer: "Petioner alleged no injury that 'reasonably

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[1] Respondents argue at the end of a footnote that "Congress has broad discretion to refrain, or to allow federal agencies to refrain, from imposing particular requirements as a condition of state participation in a federally funded program." (Resp. Brief, p. 7, n. 3, ¶ 3). This wholly unsupported assertion conflicts with at least one other judicial circuit: "The APA defines 'agency action' to include 'failure to act.' 5 U.S.C. § 551(13)." *N.A.A.C.P.* v. *Secretary of Housing & Urban Dev.*, 817 F.2d. 149, 160 (1st Cir. 1987). Respondents' purpose is uncertain here. A preceding statement held "petitioner claims (Pet. 15) that the Department of Labor's unexercised capacity to require States to *create* public fora subjects the Department to First Amendment liability, there is no basis for that claim." (original emphasis) (Resp. Brief, p. 7, n. 3, ¶ 3). Nothing in the record suggests petitioner ever claimed that the federal government must require States to create public fora.

can be said to have resulted, in any concretely demonstrable way,' from the Department's conduct. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975)."[2] (Resp. Brief, p. 6); "No such federal requirement or action caused the harm of which petioner complains." (Resp. Brief, p. 8). Only two conclusions may be drawn depending on whether the terms "Department's conduct" or "federal requirement or action" are assumed to include "failing to require States." Neither assumption leads to an outcome different than that arrived at by the petitioner.

If it is assumed that "failing to require States" *is* equivalent to or *is* included under "Department[al] conduct" or "federal requirement or action," the government has an answer to its question, but it is the same conclusion as that arrived at by the petitioner because respondents never dispute any of the cases that hold that injuries sustained in cooperative programs are traceable to the federal government's actions or requirements. *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980); *Califano* v. *Westcott*, 443 U.S. 76 (1979) (some citations omitted) (Resp. Brief, p. 7 - 8).

If, on the other hand, it is assumed the terms are not equivalent, federal respondents never answer their own question because the government never mentions anything anywhere else that can be taken to mean "failure to act."[3]

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[2] Respondents also cite *Allen* v. *Wright*, 486 U.S. 737, 753, n.19 (1984) (Resp. Brief, p. 6, n.2) but never explain how these cases relate to constitutional injuries sustained in cooperative programs.

[3] Respondents cited some of the order which also addressed issues that were never presented, that petitioner failed to allege the restrictions "stem from the DOL's violation of, or enforcement of, statutory or regulatory standards" or to "identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available to non-employers." (Resp. Brief, p. 5-6)(App. A, p. 7a). The record, however, does not reflect that the issue was enforcement of

II. RESPONDENTS CONTRADICT THEMSELVES AS WELL AS THE APPELLATE COURT CONCERNING PETITIONER'S CONSTITUTIONAL INJURY

The appeals court assumed Cahill suffered an injury. (App. A, p. 7a). The respondents also imply petitioner's injury in their answer: "Petitioner cannot trace his injury . . ." (Resp. Brief, p. 7). The government, however, in a footnote writes: "Petitioner's First Amendment claim is without merit in any event." (Resp. Brief, p. 6, n. 3, ¶ 1). Respondents then claim that the public employment offices are "neither traditional nor limited public fora, but nonpublic fora." *Id.* The respondents never provide any reasoning other than to simply state that the Court "has recognized many comparable facilities as nonpublic fora." *Id.* The government provides some citations but never explains any comparison between the nonpublic fora in the case law and the employment offices.

The government cites two cases where the "status" or "class" of a speaker resulted in a constitutional restriction of freedom of speech in a nonpublic forum. *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). (Resp. Brief, p. 7, n. 3, ¶ 2).

In *Cornelius* (content-based censorship in a nonpublic forum) the government relied on an executive order that

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statutory or regulatory standards or whether the federal government may actively prohibit or discourage States from making their federally-subsidized services available to non-employers. The issue is whether the federal government may, through inaction, allow the States to promote or engage in unconstitutional viewpoint-based censorship with federal funds. As clearly stated in the complaint, "the DOL has . . . '[a]llowed the governors and civil servants of the states to arbitrarily decide who may communicate with federal funds . . .'" (App. A, p. 4a).

specifically ruled out the class of speakers who solicited money for advocacy litigation. In *Perry* (exclusive access of elected speaker to nonpublic forum) a provision in the bargaining agreement provided that access rights to mail facilities were not available to any rival union.

In this action, respondents never cite any authority that implies Cahill or other nonemployers belong to a different "class" or have a different "status" than employers. Further, nothing in 29 U.S.C 49 *et seq.* or 20 C.F.R. 652 *et seq.* suggests Cahill, former employees and other nonemployers be treated on a different basis as employers.

The Wagner-Peyser Act specifically states the offices are for disseminating "information as to opportunities for employment." Even if the offices are considered nonpublic fora, the content of petitioner's speech, employment information, is identical to that for which the offices were established. The only difference is petitioner's viewpoint. The "State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not *an effort to suppress expression merely because public officials oppose the speaker's view.*" (added emphasis) *Perry, supra,* at 46. The federal government has yet to produce any reason for suppressing Cahill's speech.

CONCLUSION

Inaction or failure to act on a constitutional injury is as reviewable as illegal governmental action. The Eleventh Circuit opinion in direct conflict with at least one other judicial circuit. Certiorari should be granted.

Respectfully submitted. BRET E. CAHILL
pro se

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